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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA STANSEL,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 34A04-0611-CR-627
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable William C. Menges, Jr., Judge
Cause No. 34D01-0512-FA-418

May 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Following a jury trial, Joshua Stansel was convicted of robbery resulting in bodily

injury¹ as a Class B felony and burglary resulting in bodily injury² as a Class A felony. Stansel was sentenced to ten years executed for the robbery and thirty years executed for the burglary, with the sentences to be served concurrently. Stansel now appeals raising the following restated issues:

- I. Whether the trial court erred in instructing the jury on burglary and accomplice liability.
- II. Whether Stansel's convictions for robbery resulting in bodily injury and burglary resulting in bodily injury violate Indiana's constitutional prohibition against double jeopardy.
- III. Whether the State presented sufficient evidence to sustain Stansel's convictions.

We affirm in part and remand for actions consistent with this decision.

FACTS AND PROCEDURAL HISTORY

On July 3, 2005, around 9:30 p.m., Larry Hirt responded to a knock at the door of his Kokomo, Indiana home, and discovered a young woman, later identified as Ashley, who claimed she had run out of gas and needed to use the telephone. Hirt allowed Ashley to enter the home and use his phone. Once inside, Ashley offered to perform oral sex on Hirt in exchange for money. Hirt accepted her offer, paid her \$25.00 for her services, and she left. Shortly thereafter, Ashley returned, used the phone a second time, and used Hirt's bathroom, which was located between the home's two bedrooms. Hirt lost sight of her, but when she returned, she again offered to perform oral sex on him. Hirt removed his pants and lay down on his couch. As he did so, Stansel appeared from the back bedroom, having entered the

¹ See IC 35-42-5-1.

home by pushing open the window that Ashley had unlocked, and hit Hirt on the head with a club. As Hirt sat up, Stansel hit him a few more times, and demanded money. Stansel held Hirt down while Ashley took Hirt's money, and they both left the home.

In shock and dazed from the battery, Hirt wandered around the apartment until he finally called 911. An "advanced life support help ambulance" transported Hirt to a hospital emergency room. *Tr.* at 140. The treating physician noted that Hirt had several lacerations to his head and face, contusions to his eye, and a potentially life threatening closed-head injury. *Id.* at 188. Hirt was given a CAT scan and received thirty-five staples and stitches in the top, back, and side of his head. *Id.* at 87, 188. Hirt testified that he stayed with his mother for a month after this crime, and was not back to normal until three or four months after the incident. *Id.* at 88.

Hirt identified Ashley through a photo array as the woman involved. *Id.* at 89. This identification led police to Stansel, whom they arrested and charged with the following four counts: (1) robbery resulting in serious bodily injury as a Class A felony; (2) burglary resulting in bodily injury as a Class A felony; (3) burglary as a Class B felony; and (4) burglary as a Class C felony.³ At trial, Hirt identified Stansel as the man he believed hit him with a club, and latent fingerprints taken from the back bedroom window of Hirt's home were identified as belonging to Stansel. Over Stansel's objection, the State introduced Stansel's recorded statement to police and a transcript of that statement. *Id.* at 164

² See IC 35-43-2-1.

³ The trial court granted Stansel's motion for severance of counts one and two from the latter two counts. Stansel was tried and convicted of count two and of the lesser-included offense of Class B felony robbery for count one. This appeal pertains only to those two counts.

(referencing *State's Exhibits* 24 and 27). In the statement, Stansel confessed as to the manner by which he entered Hirt's home; that he and Ashley had stolen Hirt's money; and that the crime and the means of committing it were planned in advance. *State's Exhibits* 24.

Prior to jury deliberation, the trial court instructed the jury regarding robbery, burglary (Final Instruction No. 4), and accomplice liability (Final Instruction No. 8). The trial court convicted Stansel of robbery as a Class B felony and burglary as a Class A felony. Stansel now appeals. Additional facts will be added as necessary.

DISCUSSION AND DECISION

I. Instructions

Stansel first contends that the trial court erred in instructing the jury as to the offense of burglary and accomplice liability. As Stansel acknowledges, the manner of instructing the jury is largely within the sound discretion of the trial court. *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005). We review the trial court's instruction of the jury for an abuse of that discretion. *Overstreet v. State*, 783 N.E.2d 1140, 1163-64 (Ind. 2003), *cert. denied*, 540 U.S. 1150 (2004). An abuse of the trial court's discretion "occurs when 'the instructions as a whole mislead the jury as to the law in the case.'" *Ham*, 826 N.E.2d at 641 (quoting *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)).

Stansel argues that the instruction concerning burglary did not properly state the law. Final Instruction No. 4 provided:

Included in the crime of Burglary, a Class "A" felony, is the included offense of Burglary, a Class "B" felony. Before you may convict the Defendant of Burglary, a Class "B" felony, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. broke and entered
4. the dwelling of Larry Hirt
5. with intent to commit a felony, theft, in it, by knowingly or intentionally exerting unauthorized control over property of another person, with the intent to deprive the other person of part of its value or use.

The crime of Burglary, a Class “B” felony, is distinguished from the charged crime of Burglary, a Class “A” felony, by the absence of the element: The offense resulted in bodily injury or serious bodily injury to Larry Hirt.

Appellant’s App. at 131. Stansel tendered a proposed final instruction, which was identical to that given with one exception—element 4 provided “the *building or structure* of Larry Hirt,” instead of “the *dwelling* of Larry Hirt.” *Id.* at 123. Noting that in order to be a Class B felony the breaking had to be of a dwelling, the trial court revised the instruction accordingly. *Tr.* at 237-40.

Just prior to the reading of the final instructions, Stansel objected that the charging information contained no allegation that the crime was committed in a dwelling; therefore, the lesser-included offense could only be a Class C felony. Noting that Stansel had tendered the instruction, the trial court read to the jury the above-quoted Final Instruction No. 4. *Id.* at 237-38. Stansel was convicted of burglary as a Class A felony.

We agree with the State that the instruction incorrectly provided that burglary as a Class B felony is a lesser included offense of burglary as a Class A felony. The former requires the burglary of a dwelling or structure used for religious worship, and the latter requires that the burglary result in bodily injury or serious bodily injury. IC 35-43-2-1.

Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. *Smith v. State*, 755 N.E.2d 1150, 1152 (Ind. Ct. App. 2001), *trans. denied*. “An instruction error will result in reversal when the reviewing court ‘cannot say with complete confidence’ that a reasonable jury would have rendered a guilty verdict had the instruction not been given.” *Id.* (quoting *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (citation omitted)).

Here, there could have been no confusion on the part of the jury. Stansel was convicted of burglary as a Class A felony and not of a lesser included offense. The following evidence supported this conviction. Stansel broke and entered the building or structure of Larry Hirt by opening the back window to his house and crawling inside, with the intent, as revealed by Stansel’s statement, that Stansel and Ashley commit the felony of theft therein. Further, said act resulted in bodily injury to Hirt in the form of lacerations, contusions, and a closed-head injury. We can say with complete confidence that the jury would have rendered the same verdict had the proper instruction been given. The error in the language of Final Instruction No. 4 was harmless.

Stansel also contends that the trial court erred in giving the accomplice liability instruction when his charging information for robbery contained no allegation that he acted as an accomplice. Accomplice liability is not established as a separate crime, but merely a separate basis of liability for the crime charged. *Hampton v. State*, 719 N.E.2d 803, 807 (Ind. 1999) (citing IC 35-41-2-4). Indiana law provides that a person “who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense” IC 35-41-2-4.

To be convicted of a crime under the theory of accomplice liability, it is not necessary that the defendant participate in every element of that crime. *Ransom v. State*, 850 N.E.2d 491, 496 (Ind. Ct. App. 2006). In determining whether a person aided or was an accomplice to another in the commission of a crime, our Supreme Court has long considered the following four factors: “(1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant’s conduct before, during, and after the occurrence of the crime.” *Garland v. State*, 788 N.E.2d 425, 431 (Ind. 2003).

Where the facts raise a reasonable inference that the crime was carried out through an accomplice, it is appropriate for the trial judge to give such an instruction. *Hampton*, 719 N.E.2d at 807. Here, the evidence showed that Stansel and Ashley were acting together, that they had planned the robbery prior to entering Hirt’s home, and that Stansel held Hirt down while Ashley took the money from inside his wallet. Without the accomplice instruction, the jury could have improperly concluded that Stansel was not guilty of robbery because it was Ashley who took the wallet from Hirt’s pocket. Based on the planning and cooperative efforts between Ashley and Stansel, the trial court did not err in instructing the jury on accomplice liability.

II. Double Jeopardy

Stansel next argues that his conviction for robbery as a Class B felony must be reduced to a Class C felony in light of double jeopardy principles. Specifically, Stansel maintains that, under our Supreme Court’s reasoning in *Pierce v. State*, 761 N.E.2d 826, 829-30 (Ind. 2002), his Class B felony robbery conviction cannot stand because it was based upon

the same “bodily injury” that formed the basis for elevating his burglary conviction to a Class A felony. *Appellant’s Br.* at 18. The State concedes this point.

“We have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).” *Ankney v. State*, 825 N.E.2d 965, 972 (Ind. Ct. App. 2005), *trans. denied* (citing *Pierce*, 761 N.E.2d at 830). Among these is the doctrine that where a burglary conviction is elevated to a Class A felony based on the same bodily injury that forms the basis of a Class B felony robbery conviction, the two cannot stand. *Id.* at 972. That principle applies here where the State used the bodily injury that resulted from Stansel’s beating to enhance both counts.

When two convictions are found to contravene double jeopardy principles, a reviewing court may remedy the violation by reducing either conviction to a less serious form of the same offense if doing so will eliminate the violation. *Sanders v. State*, 734 N.E.2d 646, 652 (Ind. Ct. App. 2000), *trans. denied*. Accordingly, Stansel’s robbery conviction is reduced to a Class C felony.

III. Sufficiency of the Evidence

Stansel finally contends that the evidence was insufficient to sustain his convictions. Our standard of review for sufficiency claims is well settled. We neither reweigh the evidence nor judge the credibility of the witnesses. *Corbin v. State*, 840 N.E.2d 424, 428 (Ind. Ct. App. 2006); *Cox v. State*, 774 N.E.2d 1025, 1029 (Ind. Ct. App. 2002). We only consider the evidence most favorable to the verdict and the reasonable inferences that can be drawn there from. *Corbin*, 840 N.E.2d at 428. Where there is substantial evidence of

probative value to support the verdict, it will not be disturbed. *Id.* “In a criminal case, upon a challenge to the sufficiency of the evidence to support a conviction, a reviewing court respects ‘the jury’s exclusive province to weigh conflicting evidence.’” *Id.* (quoting *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (citation omitted)). “It is for the jury ‘to resolve conflicts in the evidence and to decide which witnesses to believe or disbelieve.’” *Sherwood v. State*, 784 N.E.2d 946, 952 (Ind. Ct. App. 2003), *trans. denied* (quoting *McCarthy v. State*, 749 N.E.2d 528, 538 (Ind. 2001)). If the testimony believed by the jury supports the verdict, then the verdict should not be disturbed. *Id.*

Stansel contends that the State failed to prove his identity as the attacker and, further, that the State confused the jury by introducing the theory that he could be guilty as an accomplice. Without citation to the record before us, Stansel argues that identity is an element of the crime that the State could not prove because the victim was uncertain about Stansel’s identity as the attacker.

Stansel’s claim is merely a request that we reweigh the evidence. The evidence demonstrated beyond a reasonable doubt that Stansel was the individual involved in the burglary and robbery. At trial, Hirt identified him as the man who entered his home and attacked him, which resulted in bodily injury. Recognizing that, during cross-examination, the jury heard Hirt express some uncertainty about whether Stansel was the individual, that uncertainty would have been erased by the introduction of Stansel’s statement to police that he was the man who entered Hirt’s house, hit him on the head, and, with Ashley’s assistance, stole Hirt’s money. This statement was bolstered by the fact that police found Stansel’s

fingerprints on Hirt's back bedroom window. Stansel's identity was thus proven beyond a reasonable doubt.

Stansel finally contends that he was not charged with aiding, inducing, or causing the crimes as an accomplice and was not put on notice to defend against these elements. As noted above, the Indiana law concerning accomplice liability provides that a person "who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense" IC 35-41-2-4. This is not a separate offense, but merely a separate basis of liability for the crime charged.

Stansel was charged with the crimes of robbery and burglary. To convict Stansel of robbery, as herein reduced to a Class C felony, the State had to prove that Stansel knowingly or intentionally took property from another person or from the presence of another person by using or threatening the use of force on any person. IC 35-42-5-1. Stansel does not contest that he and Ashley went into the home of Hirt and stole his wallet. The photographs of Hirt's head that were taken at the hospital, and the description of his injuries, reveal that the money was obtained through the use of force.

To convict Stansel of burglary as a Class A felony under IC 35-43-2-1, the State had to prove that Stansel broke and entered the building or structure of Hirt, with intent to commit the felony of theft therein, and that it resulted in bodily injury to Hirt. As noted above, there was sufficient evidence to show that Stansel, whose fingerprints were found on Hirt's window and who confessed to entering his home, broke and entered Hirt's home, with the intent to steal money from him, and that the crime resulted in Hirt sustaining bodily injury.

We affirm the trial court in all respects but one, finding that Stansel's two convictions were enhanced based on the same bodily injury, we reduce his conviction for robbery as a Class B felony to robbery as a Class C felony. We likewise reduce Stansel's sentence under that conviction from ten to four years, to run concurrent with his sentence of thirty years for the Class A burglary.⁴ We remand to the trial court with instructions to make entries in the record consistent with this opinion.

Affirmed in part and remanded for actions consistent with this decision.

RILEY, J., and FRIEDLANDER, J., concur.

⁴ Noting that the trial court imposed the advisory sentence on the Class B felony conviction, we order the trial court to impose the advisory sentence of four years for the Class C felony.